(26,653)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1918.

No. 567.

REDERIAKTIEBOLAGET ATLANTEN, PETITIONER,

vs.

AKTIESELSKABET KORN-OG FODERSTOF KOMPAGNIET.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

INDEX.

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., FEBRUARY 7, 1919.

a

Original.

United States Circuit Court of Appeals, Second Circuit.

AKTIESELSKABET KORN-OG FODERSTOF KOMPAGNIET, Libelant-Appellee.

against

REDERIAKTIEBOLAGET ATLANTEN, Respondent-Appellant.

TRANSCRIPT OF RECORD.

On Appeal from United States District Court, Southern District of New York.

Office Supreme Court, U. S. Filed Jul- 20, 1918. James D. Maher, Clerk.

United States Circuit Court of Appeals, Second Circuit. Filed Sep. 27, 1917. William Parkin, Clerk.

1 United States District Court, Southern District of New York.

AKTIESELSKABET KORN-OG FODERSTOF KOMPAGNIET, Libelant,

against

REDERIAKTIEBOLAGET ATLANTEN, Respondent.

Statement.

1915.

June 16. Libel filed.
Oct. 21. Answer filed.

1916.

Feb. 2. Exceptions to answer filed.
Feb. 2. Tried before Hon. Learned Hand, District Judge.
Feb. 11. Decision rendered in favor of libelant.

1917.

Feb. 9. Final decree entered.
March 5. Notice of appeal filed.
March 5. Assignments of error filed.

2 *Libel.*

To the Honorable the Judges of the District Court of the United States for the Southern District of New York:

The libel of Aktieselskabet Korn-og Foderstof Kompagniet against Rederiaktiebolaget Atlanten, in a cause of contract, civil and maritime, alleges as follows:

First. The libelant at all the times hereinafter mentioned was and still is a Danish corporation, having its principal office and place of business in Aarhus, Denmark, and engaged, among other things, in dealing in cottonseed meal, cake and other feed stuffs, and in chartering vessels for the purpose of transacting its business.

Second. The respondent, Rederiaktiebolaget Atlanten, at all the times hereinafter mentioned was and still is a Swedish corporation, having its principal office and place of business in Helsingborg, Sweden, and the owner of the Swedish steamship Atlanten, which is of 1,266 ton- net register and able to carry above 3,000 tons of cargo, 10 per cent more or less, and at all said times Herm. Swenson was and is the manager thereof.

Third. On or about September 30, 1914, at Copenhagen, Denmark, a charter party in writing was duly entered into between the libelant and the respondents, whereby it was, among other things, agreed that the steamship Atlanten should proceed to the Gulf of Mexico or Savannah, calling at Key West for orders, and should load at "Galveston, New Orleans or Pensacola (one port), charterers' option Savannah," a full and complete cargo of oilcakes, which the libelant bound itself to furnish, and being so loaded should
3 therewith proceed "as ordered when signing bills of lading to one, two, three or four good safe Danish ports (Bornholm excluded * * *)" and deliver her cargo at such wharf, dock or other safe place as the libelant's agents should direct upon arrival, in consideration of which the ship was to be paid freight at a certain rate provided in said charter party. A true copy of said charter party is hereto annexed and made a part hereof, marked Schedule A.

Fourth. Thereafter the steamship Atlanten arrived at Pensacola, where the libelant furnished and provided a full and complete cargo of oilcake to be loaded on said steamship Atlanten and performed all the terms and conditions of said charter party on its part to be performed.

Fifth. The respondent and the steamship Atlanten failed and refused to load the cargo of oilcake furnished and provided by the libelant, or any part thereof, and on or about January 8th and January 14th, 1915, wrongfully notified the libelant that the aforesaid charter party was cancelled. True copies of the correspondence between the libelant and the respondent and English translations thereof with respect to such notification are hereto annexed and made a part hereof, marked Schedules B, C and D.

By reason of the failure of the respondent and the steamship Atlanten to load and transport said cargo of oilcake as agreed by the

aforesaid charter party the libelant was obliged to incur extra storage and other expenses and to charter another ship at a greatly increased rate of freight, to the libelant's damage in the sum of $44,000.00, no part of which has been paid, although duly demanded.

Sixth. The respondent is not within the jurisdiction of this Court.

4 Seventh. All and singular the premises are true and within the admiralty and maritime jurisdiction of the United States and of this Honorable Court.

Wherefore, the libelant prays that process may duly issue against the respondent above named, and that it be cited to appear and answer this libel, and if it cannot be found then that its goods and chattels be attached in the amount sued for, with interest and costs, and that this Honorable Court will make a decree in favor of the libelant for its damages aforesaid, with interest and costs, and that the libelant may have such other and further relief as in law and justice it may be entitled to receive.

BURLINGHAM, MONTGOMERY & BEECHER,
Proctors for Libelant.

SOUTHERN DISTRICT OF NEW YORK,
County of New York, ss:

Charles Burlingham, being duly sworn, deposes and says:

I am one of the proctors for the libelant herein. I have read the foregoing libel and know the contents thereof, and the same *is* true to the best of my knowledge, information and belief. The sources of my knowledge or information are statements made to me by a representative of the libelant and an examination of documents relating to the matter in suit. The reason why this verification is not made by the libelant is that the libelant is a foreign corporation, none of whose officers are within the City of New York.

CHARLES BURLINGHAM.

Sworn to before me this 16th day of June, 1915.

[SEAL.] G. G. ZABRISKIE,
Notary Public, New York County, No. 4315.

5 SCHEDULE A.

Stamp tr. 10.

Hecksher & Son Succsrs.,

Sworn Shipbrokers, Chartering Agents,

Copenhagen.

Founded 1797.

Telgrs. "Heckshers."

Net-Charter-Party.

Copenhagen, 30th September, 1914.

It is this day mutually agreed between Herm. Swensson Esq., Helsingborg, Owners of the Steamship "Atlanten" of 1266 tons net register classed #100 A I Br. Lloyd—now trading — and Korn & Foderstof Kompagniet, Aarhus, Charterers as follows:

1. That the said steamship being tight, staunch and strong and in every way fitted for the voyage (and according to Builders' scale and plan, which Owners believe to be correct but do not guarantee, able to carry abt. 3000 tons cargo 10% more or less in addition to necessary Bunker coal, and having — cubic feet, grain space, available for such cargo) shall proceed to the Gulf of Mexico or Savannah as ordered before leaving Europe for Gulf loading steamer to call at Key West for orders, the same to be given at once by Charterers on receipt of the Captain's telegram advising vessel's arrival there; to load at Galveston, New Orleans, Mobile or Pensacola (One port) Charterers' option Savannah according to custom of port always afloat a full and complete cargo of oilcake at shipper's risk, which Charterers bind themselves to furnish, and being so loaded shall therewith proceed, as ordered when signing Bills of Lading to one, two, three or four good and safe Danish ports (Bornholm excluded), orders for 2nd, 3rd and 4th port to be given latest at 1st, 2nd, 3rd port respectively or so near thereunto as she may safely get, and there always afloat, deliver the cargo as customary, at such wharf, dock or other safe place as Charterers' Agents may direct on arrival, in accordance with Bills of Lading; in consideration whereof the vessel shall be paid freight as follows:

If loading at Savannah

17 sh say Seventeen Shillings if discharging at one Danish port
17 — 3d Seventeen " three pence " " two " ports
17 — 6d Seventeen " Six " " " three " "
17 — 9d Seventeen " Nine " " " four " "

If loading at one Gulf port rate to be one shilling ton more all around
" " " Two " " " " " one " Six pence " "

2. Charterers agree to load the vessel to full draft allowed by Underwriters' Surveyors, failing which they are to pay dead-freight for the number of tons short-shipped as shown by the excess buoyancy.

3. Steamer to have liberty to sail with or without pilots, and to tow and assist vessels in all situations, also to coal at Gulf of Mexico, Norfolk or Newport News, in which case Charterers or their agents have the option of giving orders there; said orders to be given within 12 hours of arrival, or lay days to count, and for purposes of freight to be considered as given on signing of Bills of Lading. Captain to give written notice before signing Bills of Ladng whether he calls for coal or not, and at which coaling station. Steamer to have liberty to coal at Copenhagen. Steamer to have sufficient bunkers on board from America and not to call in Europe for bunkers.

4. Should the steamer be ordered to discharge at a port, where there is not sufficient water under normal conditions for the steamer to enter first tide after arrival, and to lie always afloat, lay days are to count from 24 hours after notice of arrival at nearest safe customary anchorage, and any lighterage incurred to reach the port of discharge is to be at the expense and risk of the receiver of the cargo, any custom of the port to the contrary notwithstanding.

5. Should the steamer be ordered to a port of discharge in the Sound, Sweden or Denmark inaccessible by reason of ice on the steamer's arrival, the Master shall have the option of waiting until the port is again open, or of proceeding to the nearest safe open port or roadstead (telegraphing his arrival there to Charterers), where he shall receive fresh orders for an open and accessible port of discharge, within said countries, as above, within 24 hours of arrival or lay days to count. If so ordered, the steamer shall receive the same freight as if she had discharged at the port, to which she was originally ordered.

6. Freight payable per ton of 2240 lbs. delivered, on right delivery of cargo, in cash, at current rate of exchange.

7. Charterers to have the privilege of designating wharves or other safe places for loading or discharging. The cargo to be brought to, and taken from alongside the steamer at merchant's risk and expense. Steamer to supply steam and winchmen to drive winches, and to give use of necessary gear, also to load or discharge at night, on Sundays or Holidays or on day when notice is given, if required by Charterers such time not counting, they paying all extra expenses and labor incurred including overtime of winchmen.

8. Cash for Captain's ordinary disbursements at port of loading to be advanced, if required, steamer paying two-and-a-half per cent. commission and cost of Insurance thereon, the amount of advance to be covered by Captain's draft, payable three days after ship's arrival at port of discharge out of freight and on which the draft shall form a lien.

9. Charterers are to load, stow and trim the cargo at their own expense, under the direction of the Master, but they shall not be responsible for improper stowage. Charterers to pay all port charges incidental to the outward cargo at loading port or ports, including

elevating stevedore, wharfage, tarpaulins, and to provide and fill sacks required to secure bulk grain, also dunnage mats, if required, and to provide an agent for Custom House business, but owners to pay all port and other charges at loading port until steamer arrives at loading berth.

10. Charterers' Agents to pay cost of discharging cargo, pilotage, and all port charges incidental to their cargo at the discharging port, to which Steamer may be ordered, and to provide an agent for the Custom House business at their expense, at Copenhagen Hecksher & Son Succsrs. If owners employ tally clerks for receiving or delivering cargo, charterers' tally clerks to have the preference at equal rates.

11. Charterers to have use of any dunnage or mats, etc. as may be aboard.

12. The steamer shall be consigned to Charterers' Agents at ports of loading and discharge, and shall employ their Broker to attend to the Ship's business at their expense, at Copenhagen Hecksher & Son, Succsrs.

13. The Captain shall sign Bills of Lading or Master's Receipts as and when presented, without prejudice or reference to this Charter-party, and any difference between the amount of freight by the Bills of Lading and this charter-party, to be settled at port of loading before sailing, as customary.

14. Lay days at port or ports of loading are not to count before the 15th Decbr. A C unless with Charterers' written consent and to commence on the day following receipt by Charterers' Agents of captain's written notice of readiness, accompanied by Surveyor's certificate. Should the steamer not be ready to load on or before noon of the 15th January 1915 the Charterers have the option of cancelling this Charter-party.

Lay days at port or ports of discharge to commence on the day following receipt by charterers' agents of Captain's written notice of readiness.

15. If the steamer be not sooner dispatched fifteen (15) running days (Sundays and Holidays excepted) shall be allowed the Charterers for loading and discharging. Should the cargo not be delivered to vessel at loading port and/or discharged at port or ports of destination within the specified time, for each and every day over and above said lay days, Charterers are to pay, day by day the sum of four pence per net register ton per day demurrage, any detention through quarantine to vessel or cargo not to count in lay days. If sooner dispatched, steamer to pay £10 for each day saved.

16. The clauses herein regarding payment of port charges, stevedores, etc. at ports of loading and discharge refer only to such charges as are ordinarily incurred, any extra expenses caused by the steamer being under average, are to be adjusted in the usual way. All spaces to be placed at charterers' disposal, which would be used for cargo, if loading for owner's account, and where cargo has been carried before.

17. If the cargo cannot be delivered, loaded or discharged by reason of a strike or lock-out of any class of workmen or stoppage of

labor or lighters, or anything beyond the control of the charterers or receivers essential to the delivery, loading or discharging of the cargo, the days for loading and discharging shall not count during the continuance of such strike, stoppage or lock-out. A strike of the receiver's men only shall not exonerate him from any demurrage, for which he may be liable under this Charter, if by the use of reasonable diligence he could have obtained other suitable labor or lighters.

18. If the nation under whose flag the vessel sails be at war, whereby her free navigation is endangered, thereby causing extra or prohibitory insurance on the cargo, the charterers shall have the privilege of cancelling the charter-party at the last out-ward port of sailing, or at any subsequent period when the difficulty may arise previous to cargo being shipped. Charterers or stevedores shall not be responsible for any damage occurring while loading or discharging cargo by reason of any defect in vessel's machinery or tackle, nor for neglect on the part of vessel's officers or crew.

19. The act of God, perils of the sea, fire on board in hulk or craft, or on shore, barratry of the Master and crew, enemies, pirates and thieves, arrests and restraints of princes rulers and people, collisions, stranding, and other accidents of navigation excepted, even when occasioned by negligence, default or error in judgment of the Pilot, Master, Mariners, or other servants of the shipowners. Not answerable for any loss or damage arising from explosion, bursting of boilers, breakage of shafts, or any latent defect in the machinery or hull, not resulting from want of due diligence by the owners of the ship, or any of them, or by the ship's Husband or Manager. General average shall be adjusted according to York-Antwerp Rules, 1890.

It is also mutually agreed that this shipment is subject to all terms and provisions of and all the exemptions from liability contained in the Act of Congress of the United States, approved on the 13th day of February 1893, and entitled, "An Act relating to Navigation of Vessels," & etc. and Bills of Lading are to be signed in conformity with said Act.

20. Charter's liability to cease when the cargo is shipped, except for expenses under clause 10, the Owner or Master of the steamer having an absolute lien upon the cargo for the recovery and payment of all freight, dead freight and demurrage.

21. If any dispute arises the same to be settled by two referees, one appointed by the Captain and one by charterers or their agents, and if necessary, the arbitrators to appoint an Umpire. The decision of the arbitrators or Umpire, as the case may be, shall be final, and any party attempting to revoke this submission to arbitration without leave of a court, shall be liable to pay to the other, or others, as liquidated damages, the estimated amount of chartered freight.

22. Owners shall furnish charterers with a copy of vesesl's scale and plan showing cubic capacities of all holds and space upon signing of this Charter-Party.

23. Owners or Master shall cable vessel's departure from last port to enter upon this charter, and they shall telegraph likewise, at once, if any accident happens to the vessel while under this contract.

24. Penalty for non-performance of this agreement to be proven damages, not exceeding estimated amount of freight.

25. The Brokerage of 3 per cent. on the gross amount of freight, dead freight and demurrage including charterers share due under this Charter-Party, steamer lost or not lost, shall be paid by Owners to Hecksher & Son Succsrs. Copenhagen or order.

26. Charterers have the option of ordering the steamer to 1-2-3 or 4 Swedish ports always afloat between Goteborg and Ystad incl. paying One shilling extra freight per ton all round basis one port.

27. Steamer to proceed homewards via Skagen. north of Scotland.

28. If Flinterenden &/or Drugden should be unpassable the steamer not to be ordered South of Malmo.

For the charterers and the owner according to orders:

(Sign.) HECKSHER & SON SUCCSRS.,
Through J. A. LINNEBALLE,
Sworn Shipbroker.

For a true copy:

HECKSHER & SON SUCCSRS.,
Through J. A. LINNEBALLE,
Sworn Shipbroker.

6

SCHEDULE B.

Helsingborg, den 8 Jan. 1915.
8 - Jan. 1915.

Herm Swensson.

Telegramadress: "Herman."

Rederiaktiebolaget Atlanten:

S/S Atlanten ..... 1200 stds=3200 tons excl. bunkers.

Aktiebolaget Kattegat:

S/S Signe ..... 1400 stds=3800 " " "
" Lilly ..... 750 " =2250 " " "
" Georgia ..... 740 " =2050 " " "
" Kattegat ..... 550 " =1500 " " "

Aktiebolaget Skagerack:

S/S Anton ..... 730 stds=2000 " " "

Scott's Code.
Watkins' Code.

HERRAR HECKSHER & SONS,
Eftfr, Köpenhamn, Danmark.

S. S. "Atlanten."

Med anledning af de svarigheter, som efter hand uppstatt för sjöfärten, hvarigenom driftkostnaderna sprungit i höjden, för att

blott nämna besättningens stegrade pretentioner pa hyror och pa s. k. krigsriskersättningar etc., och icke minst pa grund af den nu ökade krigsrisken, som gör, att vi med säkerhet kunna
7 förvänta det angaren pa hemvägen kommer att blifva uppbringad af engelsmännen beklaga vi maste meddela, att vi se oss nödskade cancellera s. s. "Atlantens" C. P. Pensacolá Skandinavien och äro beredda taga de konsekvenser, som lagen, i aberopande af C.Ps. § 24, adömer oss, dock ej öfverstigande det beräknade fraktbeloppet.

Vi vilja dock gifva befraktarna tillfälle använda sig af s. s. "Atlentens" position emot att de betala en frakt, utgörande skillnaden mellan certepartiets rate och current rate, hvilken sistnämnda vi beräkna till 60/-pr ton för lastning fran Gulfen. Om dylik öfverenskommelse kan träffas, är det underförstadt, att det if ragavarande C. P. annulleras utan nagra som helst repressalier.

s. s. "Atlanten" beräknas inträffa i Pensacola den 18 Januari och kan i sa fall cara utlossad därstädes omkring den 23 dennes. Angaren har pa resan ut varit inne pa Azorerna den 30 & 31 Dec. pa grund af hardt väder och för komplettering af bunkers.

Vi anhalla att skyundsammast fa emotse befraktarnas svar, enär vi äro offererade högre frakt än den uppgifna af svenska befraktare.

Högaktningsfullt
Rederiaktiebolaget Atlanten
Herme. Swensson.

8 The translation of above reads as follows:

Helsingborg, Jan. 8th, 1915.

Herm. Swensson.

Cable Address "Herman."

Rederiaktiebolaget Atlanten:

S/S Atlanten .....1200 stds=3200 tons excl. bunkers.

Aktiebolaget Kattegat:

S/S Signe	1400	stds=	3800	"	"
" Lilly	750	" =	2250	"	"
" Georgia	740	" =	2050	"	"
" Kattegat	550	" =	1500	"	"

Aktiebolaget Skagerack:

S/S Anton	730	stds=	2000	"	"

Scott's Code.
Watkins' Code.

MESSRS. HECKSHER & SONS,
Eftfr., Copenhagen, Denmark.

S. S. "Atlanten."

On account of the difficulty which is constantly arising for shipping and thus causing an advance in current expenses due to the crew's demand for higher wages and war risk allowances and also the increased war risk in so much as the steamer is liable to be seized on her way home by the English, we regret to advise that we are compelled to cancel the "Atlanten's" charter party Pensacola to Scandinavia, and are ready to take all the consequences the Court after Clause No. 21 in the Charter Party will compel us to pay, not exceeding the estimated amount of freight.

9 We will, however, give the Charterer opportunity to make use of the position of the S/S "Atlanten" if they pay us a freight equal to the difference between the rate of charter party and the current rate which we calculate to 60/-per ton loading in Gulf. If said arrangement can be made, it is, of course, understood that the charter party in question is cancelled without any reprisal whatever.

S/S "Atlanten" is calculated to be at Pensacola on the 18th of Jan. and in such case will probably finish discharging there about the 23rd Jan. This steamer called at Azores 31st Dec. on account of bad weather for completion of bunkers.

We hope to receive a prompt answer from the charterers, as we have been offered a higher rate than the above mentioned from Swedish Charterers.

Yours truly,

REDERIAKTIEBOLAGET ATLANTEN.
(Signature unreadable.)

10 SCHEDULE C.

Kjebenhavn. B. 13 Januar 1915.

Kopi
Actieselskabet
Korn-og Foderstof Kompagniet.

Telegram-Adresse:
"Corn."

Telefon Nr. 5960 & 5961.

Statstelefon Nr. 116.

Herr Herm. Swensson,

Helsingborg.

s. s. "Signe" Certeparti 11 Sept.
s. s. "Atlanten" Certeparti 30 Sept.

Refererende til de Underhandlinger, der iaftes fandt Sted i Helsingborg, har De altsaa annulleret Certepartierne for ovennaevnte Dampere. Da De samtidigt tilbod os Baadene paany, men til en hojere Fraget og under visse Betingelser, er det klart, at De forsätlig

vil bryde Deres Certeparti alene for at opnaa en storre Fortjeneste paa vor Bekostning. Vi forlanger Certepartiet *opfyldt* og hvis De ikke gor dette, gor vi Dem ansvarlig for ethvert Tab, De derved paaforer os, hvad enten dette opstaar ved, at vimikke kan opfylde vore Salgskontrakter eller derved, at vi tvinges til at chartre andre Dampere til hojere Fragter, saavelsom det Tab, der paa enhver Maade maatte opstaa for os ved at vi ikke kunne aftage Varerne fra Amerika, derunder Oplägningsudgifter, Udgifter ved Konservering af Varerne, disses mulige Fordärvelse, samt alle Udgifter ved Retssager, idet vi vil benytte alle lovlige Retsmidler for at
11 tvinge Dem til at opfylde Deres Kontrakt og til Erstatning for ethvert Tab, De maate paafore os ved Deres retsstridige Adfärd, saavel som Renter af disse Belob. Modtagelsen af dette Brev bedes anerkendt.

Med Hojagtelse
Aktieselskabet
Korn-og Foderstof Kompagniet
(s) Hansen.

The translation of the above reads as follows:

Copenhagen, Jan. 13th/15.

Aktieselskabet
Korn-og Foderstof Kompagniet
Cable Address
"Corn"
Telephone No. 5960 & 5961

State Telephone No. 116.

Mr. Herm. Swensson,
Helsingborg.

s. s. "Signe" Certeparti 11 Sept.
s. s. "Atlanten" Certeparti 30 Sept.

Referring to the negotiations which took place yesterday in Helsingborg, you have thus cancelled the charter parties for these steamers. As you at the same time offered the vessels again but at a higher freight and with certain conditions, it is clear that you purposely cancelled the charter parties alone only to enable you to make larger profit at our expense. We demand the charter parties to be fulfilled, and if you do not do so, we will make you responsible for all losses you thereby cause us to incur, both by making it impossible for us to fulfill our sale contracts or by we being compelled to
12 charter other steamers at a higher rate, as well as the losses which may incur to us by being unable to lift the cargo in America and thereby necessitate storage and preservation expenses possible deterioration of the cargo and all other current expenses. We will make use of all legal means to compel you to fulfill your contracts and to pay us an indemnity for all losses you have incurred to us by your illegal procedure, as well as the interest on these amounts.

Please acknowledge receipt of this letter.
Yours truly,

AKTIESELSKABET
KORN-OG FODERSTOF KOMPAGNIET
(Signed) Hansen

13

Schedule D.

Helsingborg den 14 Jan. 1915.

HERM. SWENSSON

Telegramadress:
"Herman"

Rederiaktiebolaget Atlanten:

S/S Atlanten .....1200 stds=3200 tons excel. bunkers

Aktiebolaget Kattegat:

S/S Signe	1400	stds=3800	"	"	"
" Lilly	750	" =2250	"	"	"
" Georgia	740	" =2050	"	"	"
" Kattegat	550	" =1500	"	"	"

Aktiebolaget Skagerack:

S/S Anton	730	stds=2000	"	"	"

Scott's Code.
Watkins' Code.

Aktieselskabet Korn-og
Foderstof Kompagniet
KOPENHAMN B.
Danmark

s. s. "Atlanten" & s. s. "Signe."

Vi fa härmed erkänna ingangen af Edert ärade af den 13 dsoch fa till svar endast hänvisa till vara föregaende bref i denna sak, hvari vi papekat nagra orsaker som motiv för var atgärd att annullera rubr, angares certepartier.
Vi hafva nu definitivt beslutat oss för cancelleringen.

Högaktningsfullt
Rederiaktiebolaget Atlanten
Aktiebolaget Kattegat
Herm. Swensson.

Rskommendsras.

14 The translation of above reads as follows:

Helsingborg, Jan. 14th, 1915.

Herm. Swensson.

Cable Address
"Herman"

Rederiaktiebolaget Atlanten:

S/S Atlanten .....1200 stds=3200 tons excel. bunkers

Aktiebolaget Kattegat:

S/S Signe	1400	stds=3800	"	"	"
" Lilly	750	" =2250	"	"	"
" Georgia	740	" =2050	"	"	"
" Kattegat	550	" =1500	"	"	"

Aktiebolaget Skagerack:

S/S Anton	730	stds=2000	"	"	"

Scott's Code.
Watkins' Code.

Aktieselskabet Korn-og Foderstof Kompagniet,
Copenhagen, Denmark.

s. s. "Atlanten" & s. s. "Signe."

We hereby acknowledge receipt of your letter of the 13th, and in reply can only refer you to our previous correspondence in regard to this matter wherein we pointed out some reasons as motive for our stand to cancel the above mentioned steamer charter parties.

We have now definitely decided to cancel the charter parties.

Yours truly,

REDERIAKTIEBOLAGET ATLANTEN
AKTIEBOLAGET KATTEGAT
(Signature unreadable.)

15 *Interrogatories Attached to the Foregoing Libel to be Answered Under Oath by the Respondent or Its Duly Authorized Agent.*

1. State whether or not the respondent sent the letters dated January 8, 1915, and January 14, 1915, copies of which and English translations thereof marked Schedules B and D respectively, are annexed to the libel herein.

2. State whether or not respondent received the letter dated Jan-

uary 13, 1915, a copy of which and English translation thereof marked Schedule C is annexed to the libel herein.

Endorsed: Libel and Interrogatories. Filed June 16, 1915.

Answer.

To the Honorable the Judges of the United States District Court for the Southern District of New York:

The answer of Rederiaktiebolaget Atlanten to the libel of Aktieselskabet Korn-og Foderstof Kompagniet, in a cause of contract, civil and maritime, alleges on information and belief as follows:

First. Denies that it has any knowledge or information sufficient to form a belief as to the truth of any of the allegations contained in the First Article of the libel.

Second. Admits the allegations contained in the Second Article of the libel.

Third. Admits the allegations contained in the Third Article of the libel.

Fourth. Denies that it has any knowledge or information
16 sufficient to form a belief as to the truth of any of the allegations contained in the Fourth Article of the libel.

Fifth. Admits that the Steamship Atlanten failed to load the cargo of oil-cake referred to in said charter party and notified the libelant that the said charter party was canceled, and that Schedules B, C and D annexed to the libel are true copies of the correspondence between the libelant and the respondent and English translations thereof, but denies each and every other allegation contained in the Fifth Article of the libel.

Sixth. Admits the allegations contained in the Sixth Article of the libel.

Seventh. Denies that all and singular the premises of the libel are true, and alleges that this Honorable Court in its discretion, should not take jurisdiction in this case.

Eighth. Further answering the libel herein, and as a separate and partial defense thereto, the respondent alleges that the charter party between the libelant and the respondent, dated September 30, 1914, referred to in the Third Article of the libel, contains other and further clauses than those set forth in the libel. In one of these the parties liquidated their damages and fixed a limit to the recovery, in case of non-performance, beyond which damages could not be recovered. By the 24th clause of the charter party it was provided that, in case of a breach, recovery should be had for the proven damages, not exceeding the estimated amount of freight. This limitation of value was a reasonable limitation, and for any damage, sustained by failure to carry out the charter party, the libelant cannot recover more than the actual amount of freight which would have been payable had the contract been carried out. These dam-
17 ages the respondent was ready, willing, and offered to pay at the time of the breach, as appears also from Schedule B annexed to the libel herein.

Ninth. Further answering the libel herein, and as a further separate and complete defense thereto, the respondent alleges that the charter party between the libelant and the respondent, dated September 30, 1914, contains other and further clauses than those set forth in the libel. Each and every matter or thing set forth or referred to in the libel is a dispute arising under said charter. Said charter was made and entered into by the libelant, which is a Danish corporation, and the respondent, which is a Swedish corporation, and was executed and delivered in Copenhagen, Denmark, on or about the 30th day of September, 1914.

Tenth. The 21st clause of said charter party reads as follows:

"21. If any dispute arises the same to be settled by two referees, one appointed by the Captain and one by charterers or their agents, and if necessary, the arbitrators to appoint an Umpire. The decision of the arbitrators or Umpire, as the case may be, shall be final, and any party attempting to revoke this submission to arbitration without leave of a court shall be liable to pay to the other, or others, as liquidated damages, the estimated amount of chartered freight."

Eleventh. At the time of the making, execution and delivery of the said charter party it was, and at all times since then has been, the law of the Kingdom of Denmark, applicable to said charter party, that a provision in a charter party that any dispute arising thereunder should be settled by arbitration, each party nominating their arbitrator and the latter agreeing upon an umpire, if neces-
18 sary, is a valid and binding agreement for arbitration, and is binding upon each party to the said charter party, and arbitration accordingly of any dispute arising thereunder is a condition precedent to the right of either party to sue the other in any court for, upon or by reason of any matter or dispute with respect to or arising under said charter.

Twelfth. The law of Sweden is the same as that of the law of Denmark, as stated in the Eleventh Article of this answer.

Thirteenth. The respondent is, and at all times since the 30th day of September, 1914, has been, ready and willing to arbitrate, in accordance with the terms of said charter party, any and all matters or disputes with respect thereto or arising thereunder, and the libelant has failed and neglected so to do.

Fourteenth. Under and by virtue of the law of the Kingdom of Denmark and the Kingdom of Sweden, as it now exists, and as it did exist at the time of the execution and delivery of the charter party above referred to, and at all times since then the plaintiff is not and never was entitled to bring any libel in any court for, upon or by reason of any matter or dispute set forth or referred to in the libel herein; but is and at all said times has been obligated to submit all matters and things in dispute, or for which recovery is sought in this action, to arbitration, in accordance with the terms of the charter party; and now has and at all times has had the right specifically to compel the respondent to submit all said matters and things in dispute, and all matters and things for which recovery is sought in this action, to arbitration as aforesaid.

19 Fifteenth. All matters referred to in the libel relate to a dispute between foreigners, in connection with a contract made in Denmark, and this Court should not entertain jurisdiction thereof.

Wherefore respondent prays that the libel be dismissed, with costs.

HAIGHT, SANDFORD & SMITH,
Proctors for Respondent.

27 William Street, New York City.

SOUTHERN DISTRICT OF NEW YORK, *ss:*

Clarence Bishop Smith, being duly sworn, deposes and says: That he is a member of the firm of Haight, Sandford & Smith, proctors for the respondent herein; that he has read the foregoing answer and knows the contents thereof, and that the same is true to the best of his knowledge, information and belief, derived from letters received from the respondent.

The reason why this verification is not made by the respondent is that it is a foreign corporation, none of the officers whereof is now within the United States.

CLARENCE BISHOP SMITH.

Sworn to before me this 20th day of October, 1915.
[SEAL.] RUDOLPH A. TRAVERS,
Notary Public, Bronx Co.

Cert. filed in N. Y. Co.

Endorsed: Answer. Filed Oct. 21, 1915.

20 *Exceptions to Answer.*

United States District Court, Southern District of New York.

AKTIESELSKABET KORN-OG FODERSTOF KOMPAGNIET, Libelant,

against

REDERIAKTIEBOLAGET ATLANTEN, Respondent.

First. The libelant hereby excepts to the matters alleged in the eighth article of the respondent's answer on the ground that the same are insufficient in law upon the face thereof to constitute any defense to the libel herein.

Second. The libelant hereby excepts to the matters alleged in the ninth, tenth, eleventh, twelfth, thirteenth and fourteenth articles of the respondent's answer on the ground that the same are insufficient in law upon the face thereof to constitute any defense to the libel herein.

Third. The libelant hereby excepts to the matters alleged in the fifteenth article of the respondent's answer on the ground that the

same are insufficient in law upon the face thereof to constitute any defense to the libel herein.

BURLINGHAM, MONTGOMERY & BEECHER,
Proctors for Libelant.

27 William Street, New York City.

Endorsed: Exceptions to Answer. Filed Feb. 2, 1916.

21 *Opinion.*

United States District Court, Southern District of New York.

AKTIESELSKABET KORN-OG FODERSTOF KOMPAGNIET

against

REDERIAKTIEBOLAGET ATLANTEN.

This is a libel in admiralty to recover damages for the breach of a charter party against the owner. On January 8, 1915, the owner without excuse withdrew the ship from the charter and employed her upon another voyage. Thereupon the charterer libelled her and set up the charter party and the letter of withdrawal as part of his libel. To this the owner pleaded, first, that the charter party had been made in Denmark between two corporations of Sweden and Denmark, and that the charterer had made no tender of arbitration under an arbitration clause, valid in Denmark and Sweden, which read as follows:

"21. If any dispute arises the same to be settled by two referees, one appointed by the Captain and one by charterers or their agents, and if necessary, the arbitrators to appoint an Umpire. The decision of the arbitrators or Umpire, as the case may be, shall be final, and any party attempting to revoke this submission to arbitration without leave of a court shall be liable to pay to the other, or others, as liquidated damages, the estimated amount of chartered
22 freight."

Second, the owner pleaded that the recovery, if any, must be limited to the amount of the freight under the following clause No. 24 of the charter party:

"Penalty for non-performance of this agreement to be proven damages, not exceeding estimated amount of freight."

Third, the owner pleaded that this court should not take jurisdiction of a cause between two foreign corporations.

Charles Burlingham and Roscoe H. Hupper for the libelant.
Clarence B. Smith for the respondent.

LEARNED HAND, *D. J.*:

Were not the law of Denmark and Sweden pleaded so broadly, I think that it would be possible to dispose of the arbitration clause

without recourse to the question whether such clauses go to the remedy and not to the right. It is clear that the respondent did not intend to rely upon the clause in the letter of January 8, 1915, and did not suppose the case was one for arbitration at all. What it did rely on was the penalty clause under which it thought itself protected and which made it to its interest to repudiate as soon as freight got above 34 shillings. The attempt at justifying this repudiat*oin* wholly fails; the respondent violated its contract without any shadow of excuse. It even made the proposal to the libelant to take a new charter at 60 shillings, the libelant to bear the difference between that and the supposed limitation of liability. Any effort to mitigate this violation of good faith on the score of danger to the ship is answered by this proposal to undertake the same voyage.

23 Aside from the failure of the respondents to rely on arbitration, the clause would itself be irrelevant to the controversy, if the laws of Denmark and Sweden merely permitted arbitration. Though such a clause be valid in those countries, there is no reason to suppose that it has a different interpretation from the reasonable meaning of the words. I should suppose, therefore, that the rule would not be different, as to whether the clause survived an unconditional repudiation, from the rule in this country and Great Britain. If not, I am satisfied that the arbitration clause need not trouble the disposition of the cause, because it could not survive such a total repudiation as this, made without any excuse. This particular clause was certainly not intended to apply to such a case as this because the ship's arbitrator was to be picked by her captain, and it is absurd to suppose that the captain was to pick an arbitrator over the withdrawal of her owners. The withdrawal was before the voyage began, even before the ship had been delivered. Whatever be the rule applicable to arbitration clauses of more general form there can be no doubt that this clause was meant to apply only to disputes which might arise during the voyage and while the parties were at least trying to go on with its execution. Indeed, the only authority upon the subject which has been cited seems to make it a general rule that such clauses do not survive a general repudiation of the contract, Jureidini v. National British Millers Ins. Co., 1915 A. C., 499. The theory appears to be that such a provision is part of the execution of the contract, a piece of its administration and ought not to be construed as applicable to an entire change of purpose which results in the abandonment by one party of the enterprise as a whole.

24 However, the allegations of the answer do not admit of this method of disposing of the point, for they contain the statements that under the law of Denmark and Sweden arbitration is the condition precedent to any suit in any court "for, upon or by reason of any matter or dispute with respect to or arising under said charter." This, taken merely as an allegation, and it must be so taken on exceptions, would cover a suit for repudiation of the charter party as an entirety. Therefore, it becomes necessary to determine whether the clause goes to the right or to the remedy and whether it is a

condition precedent under our law if it goes only to the remedy.

Such clauses, if regarded as conditions precedent to any action, have, I believe, nearly always been held to touch the remedy and not the right, Meachem v. Jamestown etc. Co., 211 N. Y., 346; U. S. Asphalt Co. v. Trinidad Lake Petroleum Co., 222 Fed. R., 1006. They do not affect to touch the obligations of the parties, as surely they do not; they prescribe how the parties must proceed to obtain any redress for their wrongs, which means one's remedies. In one sense everything which touches the remedy touches the obligation, since the only sanction to performance rests in the remedy; but that is the speech of philosophers, not of lawyers, among whom the distinction has arisen and is real. I think we must therefore regard it as going only to the remedy.

I do not propose to consider the very vexed question whether an arbitration clause, which purports to cover all disputes and not merely the quantum of the award, may be valid, if it be clearly meant as a condition precedent. In the State of New York it certainly is invalid, Meachem v. Johnstown etc. Co., 211
25 N. Y., 346, and undoubtedly Scott v. Avery, 5 H. L. Cas., 811, has been understood very generally in this country as so fixing the law. The judgments in Exchequer Chamber, 8 Exch., 497, did proceed upon that distinction, but those in the House of Lords are, to say the least subject to a different interpretation. An entirely different question is whether the arbitration clause is a collateral undertaking, or a condition precedent. The latter question itself depends upon two questions, first, whether the distinction between condition and collateral contract touches only the remedy, and, second, whether this is a case of condition or not. That the distinction is a question of remedy, concerning as it does what are the conditions upon which suit may be brought, hardly requires more discussion after what has been said above. The court of the forum must determine what impediments, if any, exist to the exercise of its jurisdiction. The second question is whether under the lex fori such a clause as this does impose a condition upon any suit. Expressly it does not do so, but instead of a condition imposes a penalty for refusal to abide by an award. Such a clause was held in Hamilton v. Home Ins. Co., 137 U. S., 370, to be collateral and collateral only. This rule is no doubt extremely technical, U. S. Asphalt Co. v. Trinidad Lake Co., supra, but I can hardly disregard the fact that it was the basis of the actual decision in the Supreme Court, nor does it follow that that decision was wrong because no damages can be recovered under the penalty clause attached, Munson v. Straits of Dover, 102 Fed. R., 926.

The next question is of damages, i. e., whether clause 24 is to be taken in limitation of liability, or as a penalty. An English case is directly in point for the libelant, Wall v. Rederiaktiebolaget,
26 1915, 3 K. B., 66, the theory of the court being that the evolution of the clause showed it to retain the same character of a penalty which it originally had. We meet it over a hundred years ago in the form: "Penalty for non-performance, £1300." In this form it is regarded as a penalty pure and simple and as such it is

not enforceable, Harrison v. Wright, 13 East., 343. Later, in what was perhaps an effort to avoid that result, it appears as follows: "Penalty for non-performance estimated amount of freight," which is its commonest form. As such it has twice been declared to be still a penalty, Watts v. Camors, 115 U. S., 353; Ströms Bruks Aktiebolaget v. Hutchinson, 10 Aspinall, N. S., 138, affirming 41 Sc. L. R., 274. In the first case the court declined to enforce it as liquidated damages, and allowed the libellant only his proven damages, which were less than the estimated freight; in the second, the court declined to enforce it as a limitation of liability. The penalty was enforceable at law even after 8 & 9 William III, Ch. 11, §8; that statute merely provided that execution should go for only the amount of proved damages. Hence one could always recover his actual damages by suing under a penalty clause, except that he was in that event limited to the amount of the penalty.

However, along with the right to sue under the penalty, ran collaterally the right to sue on the covenant to pay, and it was never held that the penalty affected the right of the covenant in any way. Each ran concurrently, though both could not be used simultaneously, Abbott on Shipping, Part IV, Chap. 2, §2. This was the state of the law while the clause existed in either of its two previous forms, whether as penalty in a stated sum or as penalty for the estimated amount of freight. Yet during that period the
27 penalty clause really added nothing to and subtracted nothing from the promisee's rights. He might sue under either the covenant or the penalty and recover his actual damages in either event, the only difference being that if he foolishly selected the penalty, he was limited by its amount. To add to the penalty clause the words "proven damages" changed nothing whatever; it merely made express what the law imposed in any event. There is therefore not the least reason for supposing that the addition of these words in the charter party was intended to effect a limitation of liability; there was as much ground when the penalty was in a stated sum, to argue that its presence necessarily implied that the parties intended to limit any liability as after the words were added. Yet we see that the courts did not accept that conclusion when the clause was in its earlier form. It seems to follow, therefore, that Mr. Justice Bailhache could not have reached a different result in Wall v. Rederiaktiebolaget, supra, from what he did, without disregarding the whole history of the clause.

It is quite true that the practical result is to reduce the penalty clause to a brutum fulmen, but that result did not arise after the words "proven damages" were inserted; it existed from the time when the penalty would not be enforced at all, except in limitation of one who selected the penalty clause to sue upon. Of course while the practice in debt differed from that in assumpsit, there remained some real distinction, but that has long since disappeared and the clause has persisted as an archaism, such as is common enough in all branches of the law. That the parties should have really intended to limit their liability by any such inartificial and awkward paraphrase beginning with a penalty is unlikely. Such instru-

28 ments are full of formal and time-honored phrases and it is fair to look for some clear intent at so important an innovation. If they meant a limitation they should have been more explicit, Lines v. Atlantic Transport Line, 223 Fed. R., 624.

Besides, the result is most arbitrary if the clause be thought to be in limitation. It does not limit the owner at all, because in no event can he recover more than his freight; it does limit the charterer and by an amount which bears no relation to his loss. Of course the parties might have agreed to limit him, but there is no apparent reason for supposing that such a formal and mechanical equality was within their contemplation. That they should have intended to give the owner an option to repudiate merely because the bargain became very valuable to the charterer is extremely improbable; the owner might have wanted such a result, but the charterer would scarcely have agreed to it, especially in such times as the end of September, 1914.

The last question is of the jurisdiction of this court. If the matter rests in discretion, as I am now bound to hold, I have no hesitation in exercising that jurisdiction in so obvious a case in the interests of justice.

Exceptions sustained; decree for full damages with costs. I assume that the amount of the damages will be settled by agreement.

February 11, 1916.

LEARNED HAND, *D. J.*

29 *Final Decree.*

At a Stated Term of the District Court of the United States, Held in and for the Southern District of New York, at the Court Rooms Thereof in the Borough of Manhattan, City of New York, on the 9th Day of February, 1917.

Present: Hon. Learned Hand, District Judge.

AKTIESELSKABET KORN-OG FODERSTOF KOMPAGNIET, Libelant,

against

REDERIAKTIEBOLAGET ATLANTEN, Respondent.

This suit having duly come on to be heard on the pleadings and on exceptions filed by the libelant to articles eighth, ninth, tenth, eleventh, twelfth, thirteenth, fourteenth and fifteenth of the respondent's answer on the ground that the matters therein stated are insufficient in law upon the face thereof to constitute a defense to the libel herein; and said exceptions having been argued by the advocates for the respective parties and due deliberation having been had, and the Court having rendered a decision sustaining said exceptions and directing that the libelant recover its full damages and costs by reason of the matters set forth in the libel; and the damages of the libelant having been fixed by mutual agreement, as appears

by the consent at the foot hereof, without prejudice to the
30 right of the respondent to appeal herein from this decree, at the sum of $35,000, with interest from March 26, 1915;

Now, on motion of Burlingham, Montgomery & Beecher, proctors for the libelant, it is

Ordered, adjudged and decreed that the exceptions filed by the libelant to the answer of the respondent, and each of them, be and the same hereby are, sustained, and that the libelant Aktieselskabet Korn-og Foderstof Kompagniet recover of the respondent Rederiaktiebolaget Atlanten the sum of $35,000, with interest thereon from March 26, 1915, amounting to $3,990, together with $26.30 costs as taxed, amounting in all to the sum of $39,016.30, with interest thereon until paid; and it is further

Ordered that unless this decree be satisfied or an appeal taken therefrom within ten days after the service of a copy thereof with notice of entry on the respondent or its proctors, the sureties on the respondent's stipulation for costs and the sureties on the respondent's stipulation for value cause the engagements of their respective stipulations to be performed or show cause within four days, or on the first day of jurisdiction thereafter, why execution should not issue against their goods, chattels and lands to satisfy this decree.

LEARNED HAND,
U. S. D. J.

The damages of the libelant having been fixed by agreement as above set forth, without prejudice to the right of the respondent to appeal herein, we waive notice of settlement of the foregoing decree.

HAIGHT, SANDFORD & SMITH,
Proctors for Respondent.

Endorsed: Final Decree. Filed Feb. 9, 1917.

31 *Notice of Appeal.*

United States District Court, Southern District of New York.

AKTIESELSKABET KORN-OG FODERSTOF KOMPAGNIET, Libelant,

against

REDERIAKTIEBOLAGET ATLANTEN, Respondent.

SIRS: Please take notice that the respondent herein, Rederiaktiebolaget Atlanten, hereby appeals to the United States Circuit Court of Appeals for the Second Circuit from the final decree herein entered on the 9th day of February, 1917, and from each and every part of said decree.

Dated, New York, March 2, 1917.

Yours, etc.,

HAIGHT, SANDFORD & SMITH,
Proctors for Respondent.

To Alex. Gilchrist, Jr., Esq., Clerk. Messrs. Burlingham, Montgomery & Beecher, Proctors for Libelant, 27 William Street, New York City.

Endorsed: Notice of Appeal. Filed March 5, 1917.

32 *Assignments of Error.*

United States District Court, Southern District of New York.

AKTIESELSKABET KORN-OG FODERSTOF KOMPAGNIET, Libelant,
against
REDERIAKTIEBOLAGET ATLANTEN, Respondent.

The respondent-appellant, Rederiaktiebolaget Atlanten, hereby assigns error in the findings, decision and decree of the District Court herein, as follows:

1. In that the Court found as a matter of fact that the respondent did not rely upon Clause 21, the arbitration clause of the charter.
2. In that the Court found as a matter of fact that the arbitration clause of the charter was not intended to apply to a case like the present, where the parties were disputing at the port of loading, as to the owner's right to pay proved damages not exceeding the estimated amount of freight, and thus be excused from performing the voyage.
3. In that the Court held as a matter of law that the arbitration clause of the charter was not binding upon the charterer.
4. In that the Court held as a matter of law that the arbitration clause was a matter of remedy, and not a substantial part of the contract.
5. In that the Court did not refuse to adjudge this controversy on the ground that the charter was made between foreigners, in
33 a foreign country, where the arbitration clause was valid, and that this Court should not assist one of these foreigners to escape the obligations which it had voluntarily entered into.
6. In that the Court took jurisdiction of the case.
7. In that the Court found as a matter of fact that the amount of the limitation of recovery was arbitrary.
8. In that the Court failed to hold, as a conclusion of law, that the libelant should not recover more than its proven damages not exceeding the estimated amount of freight.
9. In that the Court rendered a decree for libelant.
10. In that the Court failed to dismiss the libel herein with costs.

And the respondent-appellant prays that the decree herein may be reversed and that it may be restored to all things which it has lost by reason of said decree.

Dated, New York, March 2, 1917.

HAIGHT, SANDFORD & SMITH,
Proctors for Respondent-Appellant.

27 William Street, New York City.

Endorsed: Assignment of Error. Filed March 5, 1917.

34 *Stipulation.*

United States District Court, Southern District of New York.

AKTIESELSKABET KORN-OG FODERSTOF KOMPAGNIET, Libelant-Appellee,

against

REDERIAKTIEBOLAGET ATLANTEN, Respondent-Appellant.

It is hereby stipulated by and between the proctors for the respective parties hereto that the foregoing is a true transcript of the record of the District Court of the United States in the above-entitled cause, as agreed on by the parties.

Dated, New York, April 19, 1917.

BURLINGHAM, MONTGOMERY & BEECHER,
Proctors for Libelant-Appellee.
HAIGHT, SANDFORD & SMITH,
Proctors for Respondent-Appellant.

35 *Clerk's Certificate.*

United States District Court, Southern District of New York.

AKTIESELSKABET KORN-OG FODERSTOF KOMPAGNIET, Libelant-Appellee,

against

REDERIAKTIEBOLAGET ATLANTEN, Respondent-Appellant.

I, Alexander Gilchrist, Jr., Clerk of the United States District Court for the Southern District of New York, do hereby certify that the foregoing is a true transcript of the record of the District Court of the United States in the above-entitled cause as agreed on by the parties.

In testimony whereof I have caused the seal of the said Court to be affixed at the City of New York, this 19th day of April, in the year of our Lord one thousand nine hundred and seventeen, and of the Independence of the United States the one hundred and forty-first.

[SEAL.] ALEXANDER GILCHRIST, JR., *Clerk.*

36 United States Circuit Court of Appeals for the Second Circuit, October Term, 1917.

No. 141.

Argued February 20, 1918; Decided April 10, 1918.

AKTIESELSKABET KORN-OG FODERSTOF KOMPAGNIET, Libelant-Appellee,

v.

REDERIAKTIEBOLAGET ATLANTEN, Respondent-Appellant.

Appeal from the District Court of the United States for the Southern District of New York.

Before Ward, Rogers and Hough, Circuit Judges.

Burlingham, Montgomery & Beecher, for Libelant-Appellee.
R. H. Hupper, of Counsel.
Haight, Sandford & Smith, for Respondent-Appellant.
C. B. Smith, of Counsel.

WARD, *Circuit Judge:*

The libel, containing a clause of foreign attachment, alleged that the libellant, for brevity herein called the Korn-og Company,
37 a Danish corporation, chartered the steamer Atlanten of the respondent, for brevity called herein the Atlanten Company, a corporation of Sweden, to proceed to Key West for orders and load a full cargo of oil cake at Galveston, New Orleans or Pensacola for a Danish port or ports. The charterparty was executed at Copenhagen, September 30, 1914. While the steamer was on her way to the United States the respondent wrote from Helsingborg, Sweden, to the libellant at Copenhagen, Denmark, notifying the libellant that it canceled the charter, but was willing to carry on the same Voyage at a much higher rate of freight, there having been a very considerable rise in the market. It stated at the same time that it was willing to pay damages not exceeding the estimated amount of freight under clause 21 of the charterparty, which necessarily included clause 24. The libellant replied that it would hold the respondent under the charter liable for all losses incurred by the breach. The claim was for $44,000.

The answer set up two clauses of the charterparty in defense and averred its readiness to comply with them:

"21. If any dispute arises the same to be settled by two referees, one appointed by the Captain and one by charterers or their agents, and if necessary, the arbitrators to appoint an Umpire. The decision of the arbitrators or Umpire, as the case may be, shall be final, and any party attempting to revoke this submission to arbitration with-

out leave of a court, shall be liable to pay to the other, or others, as liquidated damages, the estimated amount of chartered freight.

* * * * * * *

24. Penalty for non-performance of this agreement to be proven damages, not exceeding estimated amount of freight."

Upon libellant's exceptions to the answer on the ground that it set up nothing constituting a defense in law, Learned Hand, J., entered a decree in favor of the libellant for $39,016.30, the stipulated amount of its damages, with interest and costs.

38 The first question is whether the allegation in the answer, which must be taken to be true, that the agreement to arbitrate was valid and binding by the law of Denmark, where the charter was executed, as well as by the law of Sweden, where the steamer belonged, makes it enforcible here.

This clause cannot be regarded as a condition precedent to the maintenance of a subsequent suit in the courts because it provides that the arbitrators shall "settle", that is, dispose of the dispute. The case, therefore, does not fall within the decisions which hold that agreements such as to ascertain the amount or extent of the claim by arbitration as a condition precedent to a suit in the courts are valid because the question of liability is left to be determined by the courts, Hamilton v. Home Ins. Co., 136 U. S., 242. Under the law of the State of New York, clause 21 is clearly unenforcible because under the decisions of the Court of Appeals it would be held to affect the remedy only and to be contrary to public policy as ousting the courts of their jurisdiction, Meachem v. Railroad Co., 211 N. Y., 346; U. S. Refining Co. v. Trinidad Lake Co. 222 Fed. Rep., 1006. The question being one of general law, the decisions of the Court of Appeals of the State of New York are not binding upon the Federal Courts. It is, however, fair to assume from Hamilton v. Home Insurance Co., 137 U. S., 370, that an agreement like this, which leaves the disposition of the whole matter to arbitration is not a bar to an action in court, even if it may support an action for breach of the agreement. In such a case, when no arbitration has been actually begun and expenses incurred, only nominal damages could be recovered, Munson v. Straits of Dover S. S. Co., 99 Fed. Rep., 787.

We have next to inquire whether clause 24 is a limitation of liability or a penalty. Some such clause has been usual in charterparties from time immemorial and its history is admirably treated by Mr. Justice Bailhache in Wall v. Rederaktiebolaget Luggode (1915) 3 K. B., 66. He shows that it has always been regarded as a penalty and that the addition frequent for some years past of the words

39 "to be proven damages" not exceeding estimated amount of freight do not make it a limitation. Such is the legal meaning of every penalty clause. His construction was expressly approved by the Court of Appeal (1916) 2 K. B. 826 and by the House of Lords in Watts v. Mitsui & Co., Ltd. (1917) A. C. 227. In the Court of Appeal Swinfen Eady, L. J. said:

"There remains the third point. It is contended that, having regard to clause 13 of the charterparty, the general damages recoverable are limited to £3,500, the estimated amount of freight. This clause is a little different from the clause which used formerly to be inserted in charterparties. The old form was 'Penalty for non-performance of this agreement estimated amount of freight.' There is no doubt that in such a case the estimated amount of the freight was a penalty. On proof of the breach judgment could have been recovered for the amount of the penalty, but only as a penalty, and execution would have been limited to the damages which were proved, the judgment only standing as security for such damages. That was the position if the action was brought in respect of the penalty. At the same time the plaintiff would have been entitled to sue for general damages, and he would have recovered whatever damages were proved to have resulted in the ordinary course. In the present charterparty the clause runs thus: 'Penalty for non-performance of this agreement proved damages not exceeding the estimated amount of freight.' It is a form which seems to have been in use for a considerable time, because in Scrutton on Charter-parties, 4th ed., p. 322, published in 1899, the form given is in substantially the same language—'penalty for non-performance of this agreement to be proved damages not exceeding estimated amount of freight due under this charter.' There is a footnote: 'This clause is worthless and unenforceable.' Bailhache, J. was of opinion that the parties here only intended to express in an extended form the effect of the ordinary penalty clause. He thought that the clause was nothing more than the old common form writ large. That is not quite accurate. Under the old form, as I have pointed out, judgment could be recovered for the penalty as such. Under the amended form the plaintiff could not recover judgment for the entire estimated amount of freight as a penalty, because it is not a penalty. The clause says that the penalty is to be the 'proved damages not exceeding the estimated amount of freight.' The proved damages as such cannot be a penalty, because that is the sum which the plaintiff is entitled to recover. The learned judge has, however, given the true explanation of the clause, namely, that the framers of the clause endeavored to state the effect of the old form and they endeavored to improve it. At any rate the clause comes within that head of the charterparty which purports to provide a penalty for non-performance of the charter, and it has no reference to a claim for general damages. Whether or not the clause be meaningless as a penalty clause, it does not limit the amount which can be recovered under the charterparty as general damages. Suppose, for instance an action were brought on the charterparty against the shipowner for breach of the implied condition to supply a seaworthy ship, it might be that the loss would be very great. The action could be brought on the charterparty, although it is usually brought on the bills of lading, and if it were brought effectively on the charterparty it could not be contended that in such a case the damages were so limited. In Elderslie Steamship Co. v. Borthwick, Lord Macnaghton said: 'It is a wholesome rule that a shipowner who wishes to

escape the liability which might attach to him for sending an unseaworthy vessel to sea must say so in plain words.' In my opinion, having regard to the construction of the charterparty as a whole, this clause has no reference to the general damages; it has only reference to the penalty, and it may be that, owing to the language in which it is expressed, where the clause is in this form there is in strict-
41 ness no penalty. It cannot, however, be held to limit the general damages recoverable for breach of contract."

It is of the utmost importance that commercial documents of familiar form going to all parts of the world should as far as possible be understood everywhere in the same way which makes us the more content to follow the English decisions. It the clause be a penalty, the injured party has the right either to sue under it for his damages not exceeding the estimated amount of freight, or to sue for his actual damages under the covenants of the charter-party as the libellant has done in this case.

Even if clause 24 were to be treated as a limitation, we think it would not apply to this case. The respondent does not seek to repudiate the charter, but contends that it authorizes a withdrawal at any time. To us, however, both clauses 21 and 24 seem to contemplate disputed breaches by either party during the performance of the charterparty and not a refusal of either party to perform at all. The fact that the arbitrator for the owners is to be appointed by the captain is strong evidence of this. We find it difficult to believe that the owner was given the privilege of discharging cargo and handing it back to the charterer after it had been loaded, so that it might avail of a higher freight from someone else. No doubt the parties could agree that either might deliberately and for his own interest withdraw entirely from the charter and be responsible for no more than the estimated amount of freight. But if that were their intention they should have expressed it in unmistakable language. We do not think they have done so. The construction seems to us as little reasonable as if a carrier were to say that the familiar clause in bills of lading to the effect that his liability should be limited to a fixed sum or to the invoice value, applied to a deliberate damage, destruction or appropriation of the goods by him.

The decree is affirmed with interest and costs.

42 United States Circuit Court of Appeals for the Second Circuit, October Term, 1917.

No. 141.

AKTIESELSKABET KORN-OG FODERSTOF COMPAGNIET, Libellant-Appellee,

v.

REDERIAKTIEBOLAGET ATLANTEN, Respondent-Appellant.

Argued February 20, 1918; Decided April 20, 1918.

Appeal from the District Court of the United States for the Southern District of New York.

Before Ward, Rogers and Hough, Circuit Judges.

HOUGH, *C. J.* (Concurring):

I entirely agree with the disposition made of clause 24. As to clause 21, it is undeniable that American authority is at present as stated in the court's opinion; whether the rule as given can long survive historical and logical criticism, I venture to doubt. Concurrence as to clause 21, I rest on the plain fact that respondents repudiated their agreement in toto, and thereby debarred themselves from insisting upon any single subordinate part thereof. (Jureidini vs. National &c. Co. (1915) A. C., 499.)

43 At a Stated Term of the United States Circuit Court of Appeals in and for the Second Circuit, Held at the Court Rooms, in the Post Office Building, in the City of New York, on the 20th Day of April, One Thousand Nine Hundred and Eighteen.

Present: Hon. Henry G. Ward, Hon. Henry Wade Rogers, Hon. Charles M. Hough, circuit judges.

AKTIESELSKABET KORN OG FODERSTOF KOMPAGNIET, Libellant-Appellee,

v.

REDERIAKTIEBOLAGET ATLANTEN, Respondent-Appellant.

Appeal from the District Court of the United States for the Southern District of New York.

This cause came on to be heard on the transcript of record from the District Court of the United States, for the Southern District of New York, and was argued by counsel.

On consideration whereof, it is now hereby ordered, adjudged and decreed that the decree of said District Court be and it hereby is affirmed with interest and costs.

It is further ordered that a Mandate issue to the said District Court in accordance with this decree.

H. G. W.
H. W. R.

44 Endorsed: United States Circuit Court of Appeals, Second Circuit. Korn Og, etc., v. Atlanten. Order for Mandate. United States Circuit Court of Appeals Second Circuit. Filed Apr. 22, 1918. William Parkin, Clerk.

45 UNITED STATES OF AMERICA,
Southern District of New York, ss:

I, William Parkin, Clerk of the United States Circuit Court of Appeals for the Second Circuit, do hereby Certify that the foregoing pages, numbered from 1 to 44 inclusive, contain a true and complete transcript of the record and proceedings had in said Court, in the case of Aktieselskabet Korn-og Foderstof Kompagniet, against Rederiaktiebolaget Atlanten, as the same remain of record and on file in my office.

In testimony whereof, I have caused the seal of the said Court to be hereunto affixed, at the City of New York, in the Southern District of New York, in the Second Circuit, this 9th day of July in the year of our Lord One Thousand Nine Hundred and Eighteen and of the Independence of the said United States the One Hundred and Forty-third.

[Seal United States Circuit Court of Appeals, Second Circuit.]

WM. PARKIN, *Clerk.*

46 UNITED STATES OF AMERICA, *ss:*

[Seal of the Supreme Court of the United States.]

The President of the United States of America to the Honorable the Judges of the United States Circuit Court of Appeals for the Second Circuit, Greeting:

Being informed that there is now pending before you a suit in which Rederiaktiebolaget Atlanten is appellant, and Aktieselskabet Korn-Og Foderstof Kompagniet is appellee, which suit was removed into the said Circuit Court of Appeals by virtue of an appeal from the District Court of the United States for the Southern District of New York, and we, being willing for certain reasons that the said cause and the record and proceedings therein should be certified

by the said Circuit Court of Appeals and removed into the Su-
47 preme Court of the United States, Do Hereby Command You that you send without delay to the said Supreme Court, as aforesaid, the record and proceedings in said cause, so that the said Supreme Court may act thereon as of right and according to law ought to be done.

Witness the Honorable Edward D. White, Chief Justice of the United States, the thirty-first day of October, in the year of our Lord one thousand nine hundred and eighteen.

JAMES D. MAHER,
Clerk of the Supreme Court of the United States.

48 [Endorsed:] File No. 26653. Supreme Court of the United States, October Term, 1918. No. 567. Rederiaktiebolaget Atlanten vs. Aktieselskabet Korn-Og Foderstof Kompagniet. Writ of Certiorari. United States Circuit Court of Appeals, Second Circuit. Filed Nov. 9, 1918. William Parkin, Clerk.

49 Supreme Court of the United States, October Term, 1918.

AKTIESELSKABET KORN-OG FODERSTOF KOMPAGNIET, Libelant,

vs.

REDERIAKTIEBOLAGET ATLANTEN, Respondent-Petitioner.

It Is Hereby Stipulated and Consented that the transcript of record now on file in the Supreme Court of the United States shall constitute the return to the writ of certiorari herein.

Dated, New York City, November 6, 1918.

ROSCOE H. HUPPER,
Proctor for Libelant.
JOHN W. GRIFFIN,
Proctor for Respondent-Petitioner.

50 To the Honorable the Supreme Court of the United States, Greeting:

The record and all proceedings whereof mention is within made having lately been certified and filed in the office of the clerk of the Honorable the Supreme Court of the United States, a copy of the stipulation of counsel is hereto annexed and certified as the return to the writ of certiorari issued herein.

Dated, New York, November 11th, 1918.

[Seal United States Circuit Court of Appeals, Second Circuit.]

WM. PARKIN,
Clerk of the United States Circuit Court of Appeals for the Second Circuit.

51 [Endorsed:] United States Circuit Court of Appeals, Second Circuit. Aktieselsakabet Korn-Og v. Rederiaktiebolaget Atlanten. Return to Certiorari. 567/26653.

52 [Endorsed:] File No. 26653. Supreme Court U. S., October Term, 1918. Term No. 567. Rederiaktiebolaget Atlanten, Petitioner, vs. Aktieselskabet Korn-Og &c. Writ of Certiorari and return. Filed Nov. 29, 1918.